83-841

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

Douglas M. Billingsley — Petitioner

--Against--

The State Of Alabama — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

LOVE, LOVE & LAWRENCE, P.C.

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QUESTIONS PRESENTED

1. Whether a general, warrantless search of defendant's home conducted after the scene has been secured, all occupants accounted for, and the defendant arrested and taken to jail is outside the scope of the "emergency circumstances" exception to the requirement of a search warrant.

2. Whether the report of a murder to police by defentant's neighbor is insufficient to constitute a consent by defendant to either enter defendant's residence or to conduct an unlimited warrantless search of the premises.

3. Whether the prosecution must meet the burden of proving an exception to a per-se unreasonable search at a pre-trial hearing of motions challenging the validity of the search.

4. Whether due process precludes an appellate court from overruling a controlling procedural decision with the retroactive effect of denying a litigant appellate review of his constitutional claims.

5. Whether pre-trial publicity which sets out defendant's prior conviction of the offense for which he is presently being tried creates a presumption of prejudice to defendant's right to a fair trial.

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The opinion of the Alabama Court of Criminal Appeals affirming defendant's first conviction is reported at 402 So.2d 1052. The opinion of the Alabama Supreme Court reversing the decision of the Alabama Court of Criminal Appeals is reported at 402 So.2d 1060. The order of the Alabama Court of Criminal Appeals remanding the case for new trial is reported at 402 So 2d 1062.

The opinion of the Alabama Court of Criminal Appeals No. 7 Div.949 (May 31, 1983) which affirmed defendant's second conviction, has not been officially reported but is contained in the appendix attached hereto (Appendix A pg. A-1).The order of the Alabama Supreme Court denying certiorari, which was entered on September 22, 1983, has not been officially reported, but is contained in the appendix attached hereto. (Appendix A pg. A-17)

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on May 31, 1983. The judgment of the Alabama Supreme Court denying certiorari was entered on September 23, 1983. This Court has jurisdiction to entertain this writ of certiorari under the provisions of 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

(1) The Fourth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated..."

(2) The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "...No State shall ...deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

At approximately 8:00 P.M. on the evening of February 20, 1979, police officers of the City of Sylacauga, Alabama responded to a radio dispatch that a drunk or possibly a dead body was at the home of Douglas Billingsley, defendant herein. (Tr. 14, 60) Upon arriving at defendant's residence, the officers looked into the house through the screen door, but were unable to see anything. (Tr. 26) After an unanswered knock at the door, the officers entered the house without first obtaining either a warrant or the consent of any occupant. (Tr 19, 41) Upon entering the house, the officer discovered the body of the deceased in the living room floor, and defendant, his wife and two other individuals in the living room. (Tr. 16) The officers immediately walked through the house to determine if anyone else was present, and, after accounting for all persons in the house, secured the premises by taking up guard positions at the doors. (Tr. 17, 30, 55) Five to ten minutes after securing the premises, the shift captain arrived, and approximately thirty minutes later two police detectives arrived. (Tr. 17, 27) After the detectives arrived, the deceased's body was loaded onto a stretcher and the defendant was arrested and transported to jail, whereupon a search of defendant's house began. (Tr. 28) This search, like the initial intrusion, was done without a warrant and without the consent of either the defendant or his wife. (Tr. 19, 53) The objective of the search by the police officers was to locate the weapon which had inflicted the fatal wound. (Tr. 31) During the search a shotgun was discovered in a bedroom closet. (Tr. 53) The next day the warrantless search continued as a crime lab technician arrived and removed samples of fabric stained with blood. (tr. 35) At no time during the two day search was a warrant sought or obtained. (Tr. 36)

Defendant was convicted of murder in the second degree of the deceased, John Alvin Abrams, on September 26, 1979. (Cr. 18) On appeal the judgment was affirmed by the Alabama Court of Criminal Appeals but reversed on

certiorari by the Alabama Supreme Court and remanded. Billingsley v. State, 402 So. 2d 1052 (Ala. Crim. App. 1980) reversed Ex Parte Billingsley, 402 So. 2d 1060 (Ala. 1981) on remand Billingsley v. State, 402 So. 2d 1062 (Ala. Crim. App. 1981).

The case came up for a second trial on February 16, 1982, whereupon defendant filed a motion to suppress, a motion in limine, and a motion for continuance. (Cr. 5-9) The motion for a continuance alleged that a newspaper article which set out defendant's prior conviction and sentencing for the crime he then stood charged with, and which charted the course of the case through the appellate courts and back to the trial level, had prejudiced the jury venire to the point that defendant could not receive a fair trial. (Cr. 8, 9) After stipulating that a jury could not be empaneled that would not contain a substantial number of members who had read the questioned article, the court overruled defendant's motion for a continuance. (Tr. 4-7)

Defendant's motions to suppress and in limine sought on constitutional grounds, to suppress the fruits of the search of defendant's house along with statements taken from defendant and his wife, and further sought a court order directing the prosecution to refrain from commenting on said evidence. (CR. 5-7) After hearing testimony which set out the facts of the search of defendant's house, the trial court, in overruling defendant's motions, stated:

> "... I'm going to overrule the U. S. Supreme Court on the basis of the Court of Appeals of Alabama. They say you can do it so I'm going to overrule your motion." (Tr. 61)

The case proceeded to trial where evidence seized during the search of defendant's home was introduced against him. (Tr. 168, 249) Defendant was convicted of second degree murder on February 18, 1982. (Cr. 15) Defendant's conviction was affirmed by the Alabama Court of Criminal Appeals on May 31, 1983, holding that: (1) the pre-trial publicity which sets out defendant's prior conviction of the offense for which he stands charged creates no presumption

of prejudice to defendant's right to a fair trial: (2) the general, warrantless search of defendant's home was justified under the "emergency circumstances" exception to the requirement of a search warrant: (3) the action of defendant's neighbor in calling the police operated as a consent by defendant to a search of defendant's house and: (4) defendant had waived his objection to the alleged illegal search and seizure by failing to object to the introduction of the evidence alleged to be illegally seized when it was offered at trial. (Appendix A, pg 1-15)

REASONS FOR GRANTING THE WRIT

1. In Mincey v. Arizona, 437 U.S. 385, (1978), ((hereinafter cited as Mincy,), this Court expressly rejected the concept of a "murder scene" exception to the requirements of a search warrant. However, the Court recognized in Mincey that certain exigent circumstances will justify what would otherwise be an illegal, warrantless search. Mincey, 437 U.S. at 392

In the case at bar the Alabama court has seized upon the concept of exigent circumstances in holding that officers investigating the scene of a homicide, after the scene has been secured, all occupants accounted for, and the defendant arrested and taken to jail, (TR. 26-30) were in an emergency situation justifying a two day search of defendant's home.(Appendix A,pg.7-9)The Alabama court's assertion that the officers needed to conduct a warrantless search of defendant's home approximately one half hour after initially securing the premises (TR.27) to determine if a killer or other victims were present ignores the admission by the investigating officer that the object of the search was to locate the weapon that had fired the fatal shot. (TR.31)

This Court, in Mincey, has clearly held that emergency circumstances do not exist once all persons have been located and the scene secured, Mincey, 437 U.S. at 393 Indeed , the language of this Court in Mincey is equally appropriate when applied to the facts herein, in that:

"(it) simply cannot be contended that this search was justified by any emergency threatening life or limb. All the persons in (defendant's home) had been located before the investigating homicide officers arrived there and began their search ... There was no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. Indeed the police guarded the ...(house)... to minimize that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained." Mincey, 437 U.S. at 393, 394

The decision of the Alabama Court in holding a warrantless search and seizure under the foregoing set of facts to be justified as an emergency circumstance flies directly in the face of this Court's decision in Mincey, and distorts the heretofore clearly defined emergency circumstances exception to the requirements of a search warrant beyond all recognition. In the words of the trial court, this decision has "overruled the U.S. Supreme Court on the basis of the Court of Appeals of Alabama." (TR.61) Clearly by the trial court's own admission, this case has been decided in a manner inconsistent with the prior holding of this Court in Mincey, and is due to be reversed.

2. This Court has held that searches conducted without warrants are per se unreasonable under the Fourth and Fourteenth Amendments, subject to a few well-delineated exceptions. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (hereinafter cited as Schneckloth). A search conducted pursuant to valid consent is an exception to the requirement of a warrant, however the burden is upon those relying upon consent to justify a warrantless search to prove that the consent was freely and voluntarily given. Schneckloth, 412 U.S. at 222.

In the case at bar it is uncontroverted that neither the defendant nor his wife ever invited any police officer into their home or gave any police officer consent to conduct the

search which produced the alleged murder weapon. (Tr. 19, 41, 53) In fact the search which produced the alleged murder weapon was conducted after defendant and his wife had been taken into custody and transported to jail. (Tr. 28) Notwithstanding the undisputed evidence that no consent to enter or search was ever either sought or obtained, the Alabama court held that defendant, by directing a neighbor to "call the police", (Tr. 71) had consented to a two-day general, warrantless serach of his home. (Appendix A, pg. A-9)

Even when an official search is properly authorized. whether by consent or by issuance of a valid warrant - the scope of the search is limited by its authorization. Walter v. United States, 447 U.S. 649 (1980) (hereinafter cited as Walter). Assuming arguendo that the call to police made at defendant's direction, which informed police that a man had been killed and which directed police to defendant's home, vested in police any authority whatsoever to enter the home initially, there was certainly no evidence from which any inference could be drawn that the scope of defendant's consent was anything other than consent to enter the home and remove the body.

The Alabama Court's postulation that defendant, by failing to object to the initial intrusion, had tacitly consented to the warrantless entry onto the premises, even if constitutionally maintainable in light of this Court's holdings in Schneckloth and Walter, would not extend in scope to encompass the warrantless search which occurred after defendant had been arrested and taken to jail - it being impossible to object to a search which defendant did not know was taking place.

This Court has not heretofore clarified the standards for consent to search under Schneckloth, or delineated the extent to which an invitation to enter a residence constitutes a forfeiture of that individual's reasonable expectation of privacy therein. However, in an analgous situation, this Court has held that an invitation to enter extended by a retail store does not rise to the level of an authorization to

conduct wholesale searches and seizures without warrants. LO-JI Sales, Inc., v. New York, 442 U.S. 319 (1979)

The decision by the Alabama Court that its citizens, by asking for police assistance, forfeit all reasonable expectations of privacy in their residence, dangerously expands the concept of a consent to search and seriously infringes upon Fourth and Fourteenth Amendment guarantees of freedom from warrantless intrusion. This case presents an opportunity for this Court to clarify the standards for valid consent to search under Schneckloth, and to delineate the extent to which an invitation to enter a residence constitutes an authorization to conduct a warrantless search of the premises.

3. In Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (hereinafter cited as Gannett) this Court held that the whole purpose of pre-trial suppression hearings is to screen out unreliable or illegally obtained evidence and to insure that this evidence does not become known to the jury. Gannett 443 U.S. at 378. The Court has held warrantless searches and seizures to be per-se unreasonable and has placed the burden upon the prosecution to establish some exception which would justify a warrantless entry. Mincey, 437 U.S. at 390, 391, United States v. Jeffers, 342 U.S. 48 (1951)

In the pre-trial suppression hearing held in the case at bar, the prosecution affirmatively disproved any exigent circumstances which would justify a warrantless search and failed to offer any evidence directed to the issue of defendant's consent to search. (Tr. 14-61). Nevertheless the Alabama court, relying upon evidence adduced at trial, held that defendant had consented to a search of the premises by directing a neighbor to call the police. (Appendix A. pg. A-9)

The use of the trial record by the Alabama Court in sustaining the constitutional validity of the warrantless search operates to thwart the whole purpose of a pre-trial suppression hearing as set out by this Court in Gannett, and places before the jury evidence which this Court has held,

in Mincey, to be unreasonably seized per-se, without any justification for the warrantless seizure by the prosecution. To allow the prosecution to justify a warrantless search based upon evidence offered at trial, after having failed to justify the search at a pre-trial suppression hearing, renders meaningless this Court's imposition upon the prosecution of the burden of proving the reasonableness of a warrantless search. Thus, in order to effect the stated purpose of pre-trial suppression hearings, deny the jury access to evidence which has been deemed illegal per-se, and give meaning to the burden imposed upon the prosecution to prove the reasonableness of a warrantless search, the petitioner urges this Court to adopt a rule which would require the prosecution to sustain the burden of proving a justification for a warrantless search at a pre-trial suppression hearing challenging the seizure, and further to prohibit the appellate courts from looking to the trial record to justify a warrantless search in cases where the prosecution has failed to meet it's burden at the pre-trial hearing.

4. In the case at bar the Alabama court held that any violation of defendant's security from unreasonable search and seizure was waived by failure to object to the fruits of the illegal search when offered at trial, even though defendant had filed pre-trial motions addressed to the subject, and a full evidentary hearing was conducted before trial was commenced. (Appendix A, pg. A7-10) This holding by the Alabama court operates to overrule its prior decision in Taylor v. State, 337 So. 2d 773, 775 (Ala. Crim. App. 1976) (hereinafter cited as Taylor), wherein the Court stated:

> ". . . once the court has ruled on a motion to suppress supported by competent evidence as to the validity vel non of the search and seizure, it is not necessary for the defendant again at the trial to object to the evidence on constitutional grounds, and that the failure to do so does not constitute a waiver. The ruling on the motion preserves the point." Taylor, 337 So. 2d at 775

Taylor v. State was clearly the controlling authority on this procedural issue at the time of the trial in this case. In Bouie v. Columbia, 378 U.S. 348 (1964) this Court held that a state court denies a litigant due process where it overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case. The language of Bouie is equally appropriate when applied to a decision which reverses a procedural decision thereby denying a litigant appellate review of his constitutional claims. In reaching their decision that defendant's failure to object constituted a waiver of his constitutional claims, the Alabama court has attempted to insulate otherwise valid constitutional claims from review through a process of ambush, thereby depriving defendant of an opportunity to be heard in defense of his substantive rights, Bouie, 378 U.S. at 354. Therefore, petitioner urges this Court to hold that the decision of the Alabama court is in conflict with it's decision in Bouie and further that the retroactive application of this procedural decision operates to deprive defendant of due process.

5. In Sheppard v. Maxwell, 385 U.S. 333 (1966), (hereinafter cited as Sheppard), this Court recognized that unfair and prejudicial news comment on pending trials has become increasingly prevalent, and that a trial judge has a duty to protect a defendant from inherently prejudicial publicity. In the Sheppard decision the Court warned that:

> "due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the persuasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused." Sheppard, 284, U.S. at 362.

The Sheppard Court recognized that the burden of showing that pre-trial publicity has resulted in essential unfair-

ness as a demonstrable reality need not be undertaken by the accused in certain circumstances, in that certain situations involve such a possibility that prejudice will result to the accused, despite the absence of a showing of identifiable prejudice, that the conclusion may be drawn that the procedures are inherently lacking in due process. Sheppard, 384 U.S. at 351, 352

In the case at bar a news article published on the day of trial stated that the defendant had been previously convicted of the crime for which he then stood charged; that his conviction had been sustained by the Alabama Court of Criminal Appeals, but reversed for new trial by the Alabama Supreme Court; and that defendant was now on trial for the second time for this murder (Cr. 9) It was stipulated by the court that a substantial number of jurors had read the questioned article, and in fact at least one juror was reading the newspaper wherein the article appeared during defendant's argument of his motion to continue. (Tr. 4-7) Thus the case at bar can readily be distinguished from the Court's holding in Murphy v. Florida, 421 U.S. 794, (1975) that no presumption of prejudice arises from news accounts of a defendant's prior criminal record which are published to a jury. Herein the jury was exposed to news accounts detailing defendant's former conviction of the present crime for which he stands charged.

Clearly under Alabama law the prosecutor himself would be in error had he commented upon defendant's prior conviction of this crime. Wyatt v. State, 419 So. 2d 277, 282 (Ala. Crim. App. 1982) Thus, in the case at bar, the jurors were exposed to information of a character which could not have been admitted as evidence at trial. As this Court held in Marshall v. United States, 360 U.S. 310, (1959) (hereinafter cited as Marshall):

"the prejudice to defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution evidence . . . It may indeed be greater for it is then not tempered by protective procedures." Marshall 360 U.S. at 310

Petitioner urges this Court to distinguish the facts of this case from those of Murphy and to hold that a presumption of prejudice to defendant's right to fair trial arises without the necessity of a showing of actual prejudice by the defendant, when, on the day of trial, jurors are exposed to inadmissable evidence in the form of a news article which advises them that the defendant has been previously convicted of the offense for which he stands charged.

CONCLUSION

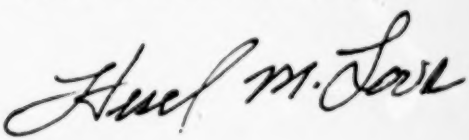
Petitioner submits that the decision of the Alabama Court holding the warrantless search of defendant's residence to be justified under the exigent circumstances exception to the requirements of a search warrant is in direct conflict with the prior decision of this Court in Mincey, and accordingly is due to be reversed. Furthermore, the Alabama court's holding that a defendant consents to a general, warrantless search of his residence by directing a neighbor to "call the police" radically expands the concept of consent to search beyond all prior decisions of this Court, and as such is a state court decision on an important question of federal law which has not heretofore been directly addressed by this Court.

The question of when the prosecution must meet its burden of proving an exception to the requirement of a warrantless search has not been addressed by this Court in light of this Court's holding that warrantless searches are per-se unreasonable. Likewise, this Court has not fully delineated the extent to which due process requires an appellate court to give a defendant fair warning of a procedural decision which would operate to reverse prior

procedure and preclude appellate review of defendant's constitutional claims. This Court has not heretofore addressed the issue of whether pre-trial publicity which sets out defendant's prior conviction for the crime which he presently stands charged - as distinguished from convictions of prior crimes - created a presumption of prejudice to defendant's right to a fair trial.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
LOVE, LOVE & LAWRENCE, P.C.

BY 

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APPENDIX

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982 - 83

7 Div. 949

Douglas Billingsley

v.

State

Appeal from Talladega Circuit Court

CLARK, RETIRED CIRCUIT JUDGE

This is an appeal from a judgment of conviction and sentence in accordance with the verdict of a jury finding defendant guilty of murder in the second degree of John Alvin Abrams and fixing punishment at imprisonment for ten years and one day. The indictment charged murder in the first degree; defendant had been been previously found guilty of murder in the second degree by a jury that fixed his punishment at imprisonment for twenty years. On appeal from the former judgment, the judgment was affirmed by the Alabama Court of Criminal Appeals, 402 So. 2d 1052 (1980), which judgment was reversed by the Alabama Supreme Court, 402 So. 2d 1060, and after remandment to the Alabama Court of Criminal Appeals, the judgment of the trial court was reversed and the cause remanded (402 So. 2d 1062).

There is little difference between the evidence on the first trial and the evidence on the second trial, which is

comprehensively covered by the opinion of this court on the former appeal, and there is no occasion for a repetition thereof. We think worthy of note, however, a matter which perhaps is insignificant -- that the sole basis for the reversal of the judgment on the first trial was the argument of State's counsel in criticism of the defense in not calling defendant's wife as a witness for the defendant in corroboration of the defendant's testimony that he did not kill the alleged victim, while on the second trial the defendant did not testify and his wife did testify when called by the defense, substantially as defendant had testified on the first trial.

Appellant presents three separate issues as bases for a reversal. We proceed to consider them in the order presented in appellate's brief.

I

The case came on for the second trial on a Tuesday, February 16, 1982, after having been set for trial on the preceding day but not being called for trial on that day. At 8:47 A.M. on February 16, defendant's attorneys filed a written motion for a continuance of the case by reason of an article that appeared in the Talladega Daily Home-Sylacauga News. A copy of the article was attached to the motion for a continuance and is as follows, under the caption of "THATCH FOUND GUILTY; MURDER TRIAL CONTINUED":

> "TALLADEGA A second murder trial of Douglas Billingsley of Sylacauga, slated to begin Monday, was continued until 9 a.m. Tuesday, but Michael Thatch was tried and found guilty of robbery during a May escape of the Talladega County Jail.
>
> "Billingsley was convicted in 1979 of second degree murder in the shotgun slaying of his next door neighbor, John Alvin Abrams, and sentenced to 20 years.
>
> "The sentence was upheld by the Criminal Court of Appeals, but was then reversed in August 1981, and

the case remanded for a new trial.

"Abrams was 71 years old when he died from a shotgun blast to the head. Billingsley was 68 years old at the time. The incident occurred at Billingsley's home at 701 Park St., Sylacauga.

"Selection of a jury was slated to get under way Monday. However, because Monday was a state holiday, assistants to the attorney general who are to prosecute the case did not appear, according to Supernumerary Judge William Bibb. Bibb continued the case until 9 a.m. Tuesday.

"Billy Wayne Roberts and Edmond Earl Payne, who fled the jail both times with Thatch, already have been convicted of escape, kidnapping, and robbery charges from the first escape. Roberts, a convicted murderer, was handed down a life sentence and two sentences of life without parole.

"Thatch was serving life without parole for a crime committed in Madison County, but was in the Talladega County Jail awaiting court action on charges here when the trio escaped."

The first matter heard at the call of the case at 9:00 A.M. was the defendant's motion for a continuance. In a colloquy among the court amd counsel for the parties it was agreed that the copy of the newspaper article would be considered as evidence. Thereupon, the following occurred;

"THE COURT: Do you have any other evidence on this motion?

"MR. LOVE: (Defendant's attorney): I'd call the members of the jury if it's necessary, Your Honor, to prove how many of them has read it. How many has read it this morning, and how many has had it in the court room over there now at this time.

"THE COURT: Well, I think we can assume this. I believe I'm right. You gentlemen speak up if you disagree with me. We can assume that you are not

going to be able to put a jury in the box that does not contain a substantial number of persons who have read this article.

"MR. LOVE: That's true, sir.

"THE COURT: Now, with that assumption or that stipulation, if any of you want to object to that, just object to it now. With that stipulation I think we can save putting each juror on the witness stand. Now, do you have anything else you want to present?

"MR. LOVE: No, sir, not with that stipulation, Your Honor.

"THE COURT: Do you have any evidence you want to present opposing this motion?

"MR. VALESKA: (Assistant Attorney General): No, sir, Judge. I don't have any evidence. I would ask the Court not--

"THE COURT: Well, we are just going to say the evidence is closed. Now, we are going to let the defendant's side argue the motion, if they choose to do so."

After considerable argument by the attorneys for the parties as to the motion for a continuance, the court overruled the motion with a statement by the trial judge as follows:

". . . Therefore, I am going to give the reason -- in fact, two reasons that appeal to me -- why I'm going to deny this motion for a continuance.

"Number one, the evidence on the motion must show, or at least raise a presumption, that the defendant has been harmed by the publicity. To put it another way, the burden rests upon the defendant on asking for a continuance to show that injustice would result if he didn't get a continuance.

"The other reason is that I've read the article and the article substantially states, in addition to what

has already been brought out, that the gentleman took an appeal and the Supreme Court of the State of Alabama reversed the case and ordered a new trial. And I'm just not at all satisfied, in my own mind, that anybody would be prejudiced by that or would be unable to sit in the jury box without any preconception. The paper says the case was reversed and a new trial was ordered. That, in itself, is a notice to everyone that the defendant did not get a fair trial on the first trial . . ."

Appellant cites splendid authority in arguing his contention that the denial of defendant's motion for a continuance constituted prejudicial error, but he does not cite any applicable authority to support him. In the cited case of Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), the ruling of the trial court under consideration was its denial of appellant's motion for a change in venue. As shown by the opinion in the case at 366 U.S. 725:

". . . A reading of the 46 exhibits which petitioner attached to his motion reveals that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial . . . These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war . . . Finally, they announced his confession to the six murders and the fact of his indictment for four of them . . ."

It is true, as argued by appellant, that publicity as to an approaching or existing trial can be so extraordinarily unfavorable to a party as to be presumptively prejudicial to such party. Thus, in Rideau v. Louisiana, 373 U.S. 723, 83 S Ct. 1417, 10 L. Ed. 2d 663 (1963), according to appellant, a presumption of prejudice to defendant's right to a fair trial was found to exist by reason of the broadcast three times in

the rural community from which the jury was drawn of a film of defendant's confession. Also, as argued by appellant, it was held in Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed 2d 1250 (1959), that "jurors apprised of a criminal's prior record by news sources are presumed to be prejudiced."

We see no basis for any presumption of prejudice to defendant arising out of the newspaper article quoted above. It is a correct recital of past and existing facts with reference to the case. Even so, it could have been prejudicial to defendant if the facts stated tended to show defendant's guilt or otherwise adversely reflected upon him. In our opinion, it did not do so. We think the trial court viewed the matter realistically and correctly. On both trials there was large number of witnesses, largely the same witnesses on each trial. Irrespective of what was stated in the news item, a postponement of the second trial for even an extra-ordinary length of time would not have prevented any of the jury selected to try the case from knowing that there had been a previous trial of the case. The fact that there had been a previous trial of itself furnished a proper basis for cross-examination of most of the witnesses as to some of their testimony on the previous trial. Certainly the jurors were intelligent enough to know that he had not been acquitted on the previous trial, that, if he had been, he could not be tried again. In the light of these facts, facts that the jury would have known irrespective of the news item, it cannot be said that the news item was any more unfavorable to defendant than it was favorable to him.

In commendable zeal by appellant's counsel on behalf of his client, he states in his brief:

> ". . . Indeed, had a prosecutor or a witness in the instant trial uttered, in the presence of the jury, that the defendant had previously been found guilty of this same charge, a mistrial would have been mandated. See . . . (a number of cases appearing in the following(; Anno. Sect. 13, 31 A.L.R. 2d 417, 428 (1953)."

Our consideration of the cited section of 31 A.L.R. 2d 417 and the corrseponding section in A.L.R. 2d Later Case Service (1981) convinces us that neither the cited annotation, nor any of its contents nor any of the cases cited are referable to the jury's being informed as to the previous conviction of the defendant on a former trial in the same case. Some of the cited cases do involve a former conviction of the defendant that could be classified as the "same" charge in the broad signification of the word "same" but not in the sense that it would encompass a previous conviction in the same case in which a defendant is in the process of being tried a second time. The cases upon which appellant relies for support, in respect to his contention now under consideration, pertain to previous convictions in cases other than cases in which defendants had been previously tried.

We do not disagree with the action of the trial court in overruling defendant's motion for a continuance, but even if we did, the trial court should not be reversed. A motion for a continuance is addressed to the sound discretion of the trial court, and the exercise thereof will not be disturbed in the absebce of a clear abuse by the trial court of such discretion. Fletcher v. State, 291 Ala. 67, 277 So. 2d 882 (1973); Graham v. State, 403 So. 2d 275. (Ala. Crim. App. 1980) writ quashed, Ex parte Graham, 403 So. 2d 286 (Ala. 1981); Wilson v. State, 395 So. 2d 1116 (Ala. Crim. App. 1981).

II

The second issue presented by appellant pertains to the action of the trial court in overruling defendant's motion captioned a "MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE" and defendant's motion captioned a "MOTION IN LIMINE, " in which defendant moved the court to direct the prosecution to refrain from asking questions or commenting upon, inter alia, "Any firearm or firearm ammunition seized or located in defendant's place of residence subsequent to the death alleged in the indictment" and "Any tangible item seized from the defendant's person during his incarceration ...."

There is considerable difference between the way the search and seizure of items in the house where the recently deceased body was readily observed by the police upon their being called to the residence were questioned on the first trial and the way defendant questioned such search and seizure on the second trial. However, in large part, the question presented now, as well as the question presented then, was resolved adversely to appellant by the following language of this court in Billingsley v. State, supra, at 402 So. 2d 1059, 1060:

> "Relying on Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), the defendant contends that a shotgun found in his bedroom closet was illegally seized. Mincy held that there was no 'murder scene exception' to the warrant requirement of the Fourth Amendment. '(The warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there.' However, the Supreme Court did not condemn all investigating and warrantless searches at the scene of the crime.
> " 'We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises .... And the police may seize any evidence that is in plain view during the course of their legitimate activities.'
> Mincey, 98 S. Ct. at 2413-14."

The fact that a recently fired shotgun was found in the defendant's bedroom closet was doubtless the prime

damaging item found in defendant's residence. Although the closet was closed and the gun was not in plain view until the officers opened the door, it is clear that the situation the officers observed presented a puzzling question as to whether a "killer" other than or in addition to the defendant, or perhaps a victim other than or in addition to Mr. Abrams, was in the residence at the time. Probably the best place for any other killer was in the bedroom closet of the defendant. In our opinion, the opening of the closet door under the emergency circumstances without any search warrant was not in violation of defendant's Fourth Amendment right to security" against unreasonable searches and seizures." Furthermore, we are convinced that the undisputed evidence shows that the officers were invited to the residence of defendant by Mrs. Black at the direction of the defendant, which Mrs. Black accomplished indirectly by calling the telephone operator and telling her to report to the police that a man had been killed. She was vague in her testimony as to what she told the operator, but it is clear that in a few moments thereafter police were at the residence of defendant and the residence of Mrs. Black and that they proceeded promptly to enter the residence of defendant without any objection or remonstrance whatever, and the first noteworthy object that came to their view was the then recently deceased body of Mr. Abrams.

Defendant's motion to suppress evidence and his motion in limine were heard jointly, apparently with the consent of all concerned. There was lengthy testimony consisting almost exclusively of that of law enforcement officers testifying on call of the defendant interspersed by objections or comments of the attorneys and the court, which was concluded as follows:

"MR. WOODS: (Attorney for defendant): That's all we have, Judge.
"THE COURT: Do you want to arque this motion?
"MR. LOVE: (Attorney for defendant): No, we submit it to the U. S. Supreme Court.
"THE COURT: Well, I'm going to overrule the U.S.

Supreme Court on the basis of the Court of Appeals of Alabama. They say you can do it, so I'm going to overrule your motion.

"MR. LOVE: To which we have an exception to.

"THE COURT: Very well.

"MR. WOODS: Yes, sir, we except to Your Honor's ruling."

We disapprove of the language of the trial court, "I'm going to overrule the U.S. Supreme Court on the basis of the Court of Appeals of Alabama. They say you can do it, so I'm going to overrule your motion." The reference is doubtless to that part of the opinion of this court in Billingsley v. State, supra, at 402 So. 2d 1059, 1060, wherein this court distinguished the facts in the instant case from the facts constituting the prolonged search in Mincy, supra, and further stated, "Additionally, the record shows that, when the shotgun was offered into evidence by the State, there was no objection." We look to the transcript for the first reference on the trial involved in the instant appeal to the shotgun and find it during the direct examination of Officer Haye as follows:

"Q. Officer Haye, did you see any items that were found in the defendant, Mr. Billingsley's house that evening?

"MR. WOODS: May it please the Court, we object on the grounds earlier stated to the Court.

"MR. LOVE: That question is so general.

"THE COURT: I will sustain the objection to the particular question or to the form of the question.

"MR. WASDEN: I'll rephrase the question, Your Honor.

"Q. While you were in the house, were any shotgun shells found?

"A. Yes, sir, it was.

"Q. And was a shotgun found in the house that evening, Officer Haye?

"A. Yes, sir.

"Q. And did you happen to see Captain Bryant examine that shotgun?

"MR. LOVE: May it please the Court, we object.

"MR. WOODS: We object to his leading the witness and asking for a conclusion.

"THE COURT: Well, that might be leading to a degree, but I don't think it's particularly-- 'I don't think it's harmful. I'll overrule that objection.

"A. Yes, sir, it was in the closet in the bedroom

"Q. Well, did you see Captain Bryant examine the shotgun?

"A. Yes, sir.

"Q. In what way did he examine it?

"A. He picked it up out of the closet and smelled of it and then laid it on the bed."

It is to be readily observed from the matter last quoted that evidence as to the shotgun, that it was found in the closet of the bedroom and that an officer smelled it and laid it on the bed, was introduced in evidence without any objection by defendant. It then became a proper subject of further inquiry by both the State and the defendant. Whatever right of the defendant to security against unreasonable searches and seizures was violated by the search of the house and the seizure of the shotgun , there was no error prejudicial to defendant in any of the rulings of the trial court on the subject.

III

Appellant's third contention for a reversal pertains to the action of the court in sustaining the State's objection to proffered evidence by defendant of the hospital records of Mrs. , Wilma Black, a witness for the State and a neighbor of defendant whom he had told that he had shot someone and whom he asked to call the police. The records indicate

that Mrs. Black was in the hospital during a period commencing November 23, 1978 "with a long history of abuse of Darvon," and defendant proposed to show by expert testimony that "Darvon affects a person's ability to perceive things by sight and hearing, and, further, it affects their ability to relate."

The witness had admitted that she was in the hospital about ninety days before the homicide involved in the instant case, but she stated that she was in the hospital for phlebitis and her doctor had prescribed Darvon for her to take every six hours and she was complying with such prescription at the time of the homicide. The scope of the evidence proffered by defendant broadened while the presentation of the matter to the court in the absence of the jury continued. It developed that the witness was again admitted to the same hospital on November 16, 1979, and discharged on December 6, 1979, that she was again admitted on January 18, 1980, and discharged on February 1, 1980, and that the record of the last admission listed a history of "chronic abuse--drug abuse--and, further,... Mrs. Black at that time suffered symptoms of withdrawal from Darvon and Meprobamate." After extended argument by counsel as to the admissibility of the hospital records for the three mentioned hospitalization periods, the trial court said:

> "I'm going to rule them all out on the ground of remoteness. That's a part of the reason, and the other part of why I'm moving them out is that they do not actually show or do not tend to show, in my consideration, in any material way that at the time of the incident, which is the subject of this prosecution, the lady was taking more than one Darvon tablet every 6 hours, which she testified to herself, and therefore, there would not be impeachment.
>
> "Now, let me say this; Of course, I don't have anything to do with whether something is true or false. That's up to the jury eventually and finally.

> The lady is a little eccentric in her statements. I mean, she doesn't talk just like a lawyer does. If one lawyer says she does not testify in the language of the Supreme Court Reporter, but my impression of her is that she is doing the best she can, and unless something substantial could be brought forward to disprove that or shake that initial idea, she should at least be entitled to the same respect that all of us are entitled to, that is, just as a fellow human being.
>
> "MR. WOODS: We except to Your Honor's ruling.

In Gamble, McElroy's Alabama Evidence, S 141.01 (3), it is stated:

> "A witness ' addiction to a narcotic drug is not admissible to impeach him unless one of the following are found: (1) that he is under the influence of the drug at the time of his testifying, (2) that he was under the influence of the drug at the time of the event of which he testifies or (3) that his mind is generally impaired by the habitual use of narcotics (sic) drugs."

The case relied upon for the statement just quoted is Standard Oil Co, v. Carter, 210 Ala, 572, 98 So. 575 (1923), in which the following is also stated:

> "...The question to Dr. Greer, as to whether or not the plaintiff had not for many years prior to the injury and subsequent thereto been an 'opium habitue,' did not show that he was under the influence of the drug at the time of the injury or at the time of testifying. Nor did it show that the habit was so excessive as to have impaired the memory of the plaintiff. True, it was essential to prove the habitual use of opium as a predicate to establish the extent of the same, but in order to put the trial court in error, the question should have been followed up by a statement or assurance that defendant expected to show that the habit was so excessive as to impair

the memory of the plaintiff."

In appellant's brief, he urges that the offer made by him met the requirement set forth in the last sentence of the statement quoted above from Standard Oil Co. v. Carter, but we do not think so. The following is the offer upon which he relies:

> "Judge, we would make an offer that these records would establish, as set out in McElroy, that the witness was under the influence of these drugs at the time of the event of which she testifies, and further, we would offer these showing her habitual use of these drugs that her mind is generally impaired by the habitual use of narcotics drugs. We would further offer to prove that she was under the influence of one or the other of these drugs at the time of her testimony in this case."

We think rather that by defendant's proffered evidence of the contents of the hospital records of the witness, he was offering a matter from which it could be argued that the witness "was under the influence of a drug at the time of the injury or at the time of testifying or that it was so excessive as to impair the memory of the (witness)," but there was no offer by defendant's counsel to show, or assurance that he would show by other competent evidence, that, according to the hospital records, when considered with the other evidence in the case, the witness sought to be impeached was "under the influence of the drug at the time of the injury or at the time of testifying. . . or that the habit was so excessive as to impair the memory of the (witness)."

In our opinion, the trial court properly appraised the proffered evidence and the proposed impeachment of the witness Mrs. Black and its ruling adverse to defendant on the subject did not constitute prejudicial error.

CONCLUSION

We have not endeavored to convince ourselves as to the factual question as to whether the appellant killed Mr. Abrams. We know of no reasonable contention to be made, however, under the undisputed evidence, other than that the defendant or some other man in defendant's residence at the time killed Mr. Abrams. According to some of the evidence, which has not been definitely disputed, another man was in the house a short time prior to the death of Mr. Abrams, a man who has not testified in the case and whose whereabouts at the time of the homicide is not clearly shown by the evidence. We find no claim by either of the parties, or anyone else, that he was the killer.

In the final analysis, we find that there is no basis for reasonable belief that any person or group of persons, without actual knowledge of the identify of the killer, is in a better position to determine the guilt or innocence of the defendant than was the jury that rendered the verdict in the case.

The judgment of the trial court should be affirmed.

The foregoing opinion was prepared by Retired Circuit Judge Leigh M. Clark, serving as a judge of this Court under the provisions of S 6.10 of the Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of the Court.

AFFIRMED.

ALL THE JUDGES CONCUR.

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

RE: CC 79-168-2

7th Div. 949

Talladega Circuit Court

Douglas Billingsley — Appellant

vs.

The State — Appellee

Dear Sir: This is to advise you that on July 5, 1983, the Court of Criminal Appeals announced decision of:

Application for rehearing overruled
Rule 39(k) motion denied
No opinion

in the above stated cause.

Yours truly,
MOLLY JORDAN, CLERK

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

September 23, 1983

Re: 82-1019
Ex Parte: Douglas M. Billingsley

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

Re: Douglas Billingsley, Appellant vs. State of Alabama, Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

PETITION FOR WRIT OF CERTIORARI DENIED. NO OPINION. -- Jones, J. - Torbert, C. J., Maddox, Shores and Beatty, J.J., CONCUR.

Dorothy F. Norwood
Acting Clerk,
Supreme Court of Alabama

DOUGLAS BILLINGSLEY

vs.

STATE

7 Div. 710

Court of Criminal Appeals of Alabama

April 22, 1980

Rehearing Denied May 27, 1980

Defendant was convicted in the Circuit Court, Talladega County, William P. Powers, J., of second-degree murder. Defendant appealed. The Court of Criminal Appeals, Bowen, J., held that: (1) where wife witness was not called to testify for either party, prosecutor's comment on defendant's failure to call his wife to testify was proper, defendant showing no reason for her absence and there being no comment on any privilege which had been invoked, and (2) where, during prosecutor's asked defendant whether his wife was going to come in and back him up on his testimony, and objection was sustained, and where wife's actual availability to either or both sides simply did not appear in the record, prejudice would not be assumed, nor would it be held that trial court improperly instructed jury on correctness of prosecutor's remarks that State could not call wife of defendant as witness.

Affirmed.

Judgment reversed, Ala., 402 So.2d 1060, on remand, Ala.Cr.App., 402 So.2d 1062.

B. Greg Wood, of Love, Love & Lawrence, Talladega, for appellant.

Charles A. Graddick, Atty, Gen., Joseph G. L. Marston, III, Asst. Atty, Gen., for appellee.

BOWEN, Judge.

The defendant was indicted for the first degree murder of Alvin Abrams. A jury convicted him of murder in the

second degree and fixed his punishment at twenty years' imprisonment.

For approximately one year, seventy-one year old Alvin Abrams and the defendant had been doing "a lot" of drinking together. On one occasion three months before his death, Abrams and the defendant were drinking, got into an argument and had to be separated.

Around two o'clock on the afternoon of February 20, 1979, Yellow Cab driver Michael Sergeant took Abrams to the defendant's home. Sergeant stated that, before he could leave, Abrams, accompanied by the defendant, returned to his cab and asked him to get a quart of Old Mr. Boston Whiskey.

About four o'clock that afternoon, Yellow Cab driver Virgie Sims delivered the whiskey to Abrams at the defendant's house. Sims testified that he saw the defendant, the defendant's wife, and Abrams in the defendant's house when he delivered the whiskey. They were drinking.

Mrs. Wilma Black was the defendant's neighbor. She testified that at 7:30 on the night of February 20 the defendant knocked on her back door and said, "I've killed a man, and I think it's Bob." "Bob" referred to Mrs. Black's son-in-law, Bob Ostrowski.

Mrs. Black and her daughter, Linda Ostrowski, accompanied the defendant to his house. On the living room floor lay Alvin Abrams, the right side of his face horribly mutilated from a shotgun blast. The body was cold and the blood had begun to coagulate.

The police arrived and a shotgun was found in a bedroom closet. Several witnesses for the State testified that, in their opinion, this weapon had recently been fired.

Expert testimony revealed that Abrams died of a shotgun wound to his head. An expert concluded that the shotgun was within three feet of Abrams' head when the weapon was fired. Abrams had type "O" blood; the defendant, type "A". Drops of type "A" blood were found throughout the house. Dried blood and tissue were removed from the hair of the defendant's wife. An expert concluded that this

matter could be either type 'A' or type 'O' as it contained properties of both types although he could not determine if it were one type to the exclusion of the other.

The defendant gave an exculpatory statement to Detective Glenn Talley and Sheriff Jerry Studdard. In the statement, the defendant claimed that he had not seen Abrams for two or three weeks, that no Yellow Cab had come to his house that day, and that his shotgun had not been fired in a year. He stated that he and his wife had gone to bed about eight o'clock that night and that he was later awakened by a noise. He went into the living room and found a body but did not recognize it until his wife told him who it was. At trial, the defendant's testimony was similar to the substance of this statement.

I

(1) Initially, it is argued that the conviction is due to be reversed for lack of a judgment entry adjudicating the defendant guilty.

The judgment entry signed by the trial judge and appearing in the record recites:

> "The Court in accordance with the verdict of the jury, 'We, the jury, find the defendant guilty of Murder in the Second Degree and fix his punishment at 20 years, 0 days imprisonment in the penitentiary of the State of Alabama' then by the Court adjudged guilty accordingly of Murder in the Second Degree as charged in the indictment and the defendant's punishment is fixed at 20 years' imprisonment."

"One of the requirements still obtaining and necessary to a valid judgment is that there must be a solemn adjudication of guilt." Blakely v. State, 28 Ala.App. 574, 190 So. 102 (1939). This "solemn adjudication" need not follow any specific pattern "but there must be some words to show that there has been a judgment upon the verdict." Wright v. State, 103 Ala. 95, 96, 15 So. 506, 507 (1893). While the "judgment entry in all criminal cases where there is conviction should recite in express words that the

defendant is adjudged guilty by the court as found by the jury," the language employed in the court's minute entry is to be given a liberal construction. Carmichael v. State, 213 Ala 264, 104 So. 638 (1925); Driggers v. State, 123 Ala 46, 48-49, 26 So. 512, 513 (1898). Thus a judgment entry is not "insufficient or void" because of the omission of words which would merely have made the judgment "fuller and more complete" had they been included. Wilkinson v. State, 106 Ala. 23, 28, 17 So. 458 (1894). The omission in the minute entry of the judgment of a formal adjudication of the defendant's guilt upon the verdict rendered will not render the judgment entry insufficient where it recites a judgment of sentence by the court in accordance with the verdict. Talbert v. State, 140 Ala. 96, 99, 37 So. 78 (1903).

Certainly, in this case, the judgment entry could be "more complete" but it is not so insufficient as to be void. The substance and meaning of the judgment entry are definite and sufficient to show that the defendant was adjudged guilty by the court as found by the jury. This is all that is required.

II

(2, 3) The defendant maintains that the trial court committed reversible error by allowing the prosecutor in his closing argument to the jury to draw an adverse inference from the defendant's failure to call his wife to testify as a witness.

From the record:

> "MR. YUNG (Assistant Attorney General) (resumed): Now, one of the most important things in this case- and I am about through- is not what you heard but what you did not hear. The most important thing that you did not hear is the testimony of Mrs. Billingsley.
> "MR. WOOD (Defense Counsel): We object to that, Your Honor.
> "THE COURT: This will not be charged against your time.

"Set out in Section 191.01, sub. 4, sub. C, a comment may be made on the parties' failure to call a member of his family. They cite three cases, Barnes versus State, Waller versus State and Davis versus State.
"Okay. Now you may make the comment.

"MR. YUNG (resumed): Where was Mrs. Billingsley? Now, the State can't call her. The law is that the State can't call-
MR. WOOD: I object to that, Your Honor. That is an incorrect statement of law. They can call that woman as a witness.
"MR. YUNG: That is not the law.
"THE COURT: I'll instruct the jury that the statement made by Mr. Wood is an incorrect statement of the law.
"MR. WOOD: We except, if it please the Court.
"MR. YUNG (resumed): We can't call his wife up here and make her testify on this. But he can call her to back up his testimony if his testimony is true. He could call her if in fact she were in bed asleep with him like he tells you. He could call her to back him up if in fact he woke up and went in there and found the body and then woke her up and told her to go look. He could call her to testify under oath if in fact she then went in there and looked and said, 'It looks like Alvin Abrams to me.' He could call her to testify that he told her to call the law and she tried to and that she then called Ostrowski and Mrs. Black over there if that were true.
"We can't; he could. And he didn't do it. "But on the other hand, if she told the sheriff, like the sheriff asked him on that tape, that she was asleep on the couch, not in the bed with him, that she didn't know anything about it until the police came, then the last thing in the world, the last thing in the world that he would do is call that woman, his wife, in here because we would then be able to cross examine her about what she told the sheriff. We would then be able to play the tape for you that the sheriff made when he talked to her. That's the last thing he could afford to do.
"That is why the only other witness in that house didn't testify, because we can't make her and the last thing he

wanted was for her to be in here.
"Where was Mrs. Billingsley? I think the answer to that is clear."
The basic rule is:
"Generally, if it happens both (1) that the evidence warrants a finding that a party, at the time of the trial, has one and only one member of his family who has knowledge of a material matter and (2) that such family member is not called as a witness, the opponent may comment on such party's failure to call that family member as a witness." C Gamble, McElroy's Alabama Evidence, S 191.01(4)(b) (3rd ed. 1977).
This rule is complicated by the fact that the wife is a privileged, but not disqualified, family member.

Despite language in DeBardeleben v. State, 16 Ala.App. 367, 77 So. 979 (1918)[1] and Holyfield v. State, 365 So.2d 108 (Ala. Cr.App.), cert. denied, 365 So.2d 112 (Ala. 1978)[2], it is clear that a husband or wife is competent, but not compellable, to give testimony either for or against his or her spouse in a criminal proceeding. Jay v. State, 15 Ala.App. 255, 73 So. 137 (1916). By statute the spouse-witness is competent to testify. Alabama Code 1975, Section 12-21-227. The privilege of refusing to testify belongs only to the spouse-witness. Trammel v. United

1. "...The statute of 1915, authorizing the husband and wife to testify in criminal cases (Acts 1915, p. 942), says, 'The husband and wife may testify,' etc., thus giving to them the election as to whether they become competent witnesses, and until the election is made, neither is a competent witness in a criminal case." DeBardeleben, 16 Ala.App. at 367, 77 So. at 980.
2. "The husband or wife has the right to elect to testify. Until that election is made he or she is not a competent witness. DeBardeleben v. State, 16 Ala.App. 367, 77 So. 979." Holyfield, 365 So.2d at 110-111.

States, --U.S. --, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). Competency and privilege are not interchangeable terms and must not be confused. McElroy, S 103.01 (2) and (3) (3rd ed. 1977).

> "Under our statute, it is the witness-spouse's privilege, and the defendant-spouse can in no way compel or prevent her from exercising such privilege.
> "The defendant-spouse cannot as a matter of law require her to testify in his behalf nor can the State require her to testify against him." Holyfield, 365 So.2d at 112.

This distinction between competency and privilege must be made because, if a witness-spouse were incompetent to testify until that spouse elected to testify, then any comment upon the failure of the witness-spouse to testify would be error.

(4, 5) Clearly, the prosecutor may not comment on the refusal of a spouse-witness to testify or upon the exercise of a privilege not to testify. Holyfield, 365 So.2d at 112. However, in this case, the record does not show that any privilege was exercised or invoked and the defendant's wife was not called as a witness by either party. The reason for the failure of the wife to testify does not appear.

The issue raised by the defendant was addressed by this Court in Hurst v. State, 54 Ala.App. 254, 265, 307 So.2d 62 (1974), cert. denied, 293 Ala. 548, 307 So2d 73 (1975)[3]. There the prosecutor commented on the failure of the defendant to call his wife to testify. This Court found no error in the comment.

3. In denying the petition for writ of certiorari the Alabama Supreme Court stated, "this court does not wish to be understood as approving or disapproving all of the language used or the statements of law made in the opinion of this case in the Court of Criminal Appeals." Hurst, 293 Ala. 548, 307 So.2d at 73-74.

> "It is the general rule that one party may not comment unfavorably on the other party's failure to produce a witness supposedly favorable to that party if the witness is equally available to both sides. We are not of the opinion that the doctrine of equal availability can be applied to close-blood relationship or the relationship of husband and wife. Morgan v. State, 49 Ala.App. 330, 272 So.2d 256; Commonwealth v. Spencer, 212 Mass. 438, 99 N.E. 266; 16 C.J. 904, Section 2250; 14 Am.Jur. 875, Section 151." Hurst v. State, 54 Ala.App. at 265-266, 307 So2d at 73.

There appears to be a conflict of authority in this area. See annotations at 116 A.L.R. 1170 (1938) and 5 A.L.R.2d 928 (1949). McElroy, citing cases where it was held error to comment on the defendant's failure to call a codefendant as a witness, states:

> "A party may not comment upon his opponent's failure to call a specified person as a witness where it reasonably appears that, if such person had been sworn as a witness and asked about his knowledge of material facts, he could have claimed successfully A privilege not to testify about such facts." McElroy, S 191.01(6).

We note this apparent conflict in light of the shadow of suspicion the Alabama Supreme Court has cast over Hurst.

However, we think that this apparent conflict was resolved in Spencer, which was cited as authority in Hurst. In Spencer, supra, the wife-witness was also competent but not compellable, and was not called to testify for either party.

> "As to their testimony against each other either may testify, but shall not be compelled so to do in a criminal proceeding against the other. The privilege is that of the spouse called and not of the defendant. In the case of the defendant in a criminal suit the

question whether he will testify is decided by him alone. In only this last case is his failure to produce the evidence not to be taken against him. In all other proceedings and as to all witnesses except himself in a criminal proceeding against him, the defendant is left to the general principles of law as to what inference may be drawn against him for his failure to produce evidence in his favor. In this respect our statute differs from those of some states which expressly provide that the failure of one spouse to produce the other shall not in a criminal case be taken against the defendant. See for instance St.Mo. 1899, S 2638; State v. Weaver, 165 Mo. 1, 65 S.W. 308, 88 Am. St. Rep. 406; State v. Taylor, 57 W.Va. 228, 50 S.E. 247. See also Wyman on Ev. S 488 (note).

"One of these general principles is that, where the circumstances are strong against the defendant and it becomes a question what weight shall be given to them in view of any conceivable explanation of them, if there be witnesses who could furnish any such explanation and they are peculiarly under the influence of the defendant or peculiarly related in interest to him, then his failure to produce any such witness is a proper subject for comment unfavorable to him. Com. v. Webster, 5 Cush. 295, 316, 52 Am.Dec. 711; Com. v. Finnerty, 148 Mass 162, 19 N.E. 215. A failure to explain what can be reasonably explained may be taken as evidence that the truth would not help the defendant. The jury are to judge whether the defendant has done what he could to put the evidence before them and what weight should be given to his failure. There can be no doubt in the present case that the failure of the defendant to produce his wife is within the rule, unless it is excluded by the fact that if called she might have refused to testify. Com. v. Galligan, 156 Mass. 270, 30 N.E. 1142.

"The defendant always may relieve himself from any unfavorable inference by showing that by reason of the sickness or absence of the desired witness or from any other cause he has been unable to produce him; but he is to be held to reasonable effort to produce the witness, and in the absence of any evidence of such effort the rule applies. In the present case the wife was in court during the whole or a part of the trial, and ministered to the wants of the defendant. Apparently he had ample time to converse with her. Whether or not she, if called, would testify was a matter entirely personal to her. The privilege to refuse was hers, not his. If he had called her and she had refused to testify, then no inference could have been drawn against him. It then would have appeared that he had done all he could do to call her and avail himself of her evidence. But he did not call her. It does not appear that she refused to take the stand, or that the defendant had made any attempt whatever to get her testimony. This is not a case where the defendant has the right to introduce evidence under a law saying that the failure to produce it shall not be taken against him, as in the case of his own right to testify, but is a case where the witness is competent and, if called, may testify or not as she pleases; and there is nothing to show her unwillingness. Her failure to testify is as consistent with the theory that he did not desire her to testify as with the theory that she was unwilling so to do. It cannot be assumed in his favor that her absence from the witness stand was due to her refusal to testify. If he desired to be relieved from the operation of the rule as to the production of his wife as a witness he should have shown that he had made an effort to that end. So far as respects our statute, the rule that the defendant should make reasonable effort to explain by the aid of witnesses peculiarly related to him is as applicable when the wife is the

needed witness as where any other person is is. Com. v. Galligan, ubi supra." Spencer, 99 N.E. at 271-272.

See also Commonwealth v. Noxon, 319 Mass. 495,66 N.E.2d 814, 838-839 (1946). Under this reasoning the prosecutor's comment on the defendant's failure to call his wife to testify was proper since the defendant did not show any reason for her absence and there was no comment on any privilege which had been invoked. See also Slater v. State, 43 Ala.App. 513, 194 So.2d 93 (1967), where it was held that, in order to prevent the defense from commenting on the State's failure to call a witness who was more available to the State but who was claimed by the State to be suffering from a mental condition, the mental condition should be shown by evidence so that the defendant could have an opportunity to rebut it.

III

(6) The defendant also maintains that the trial court improperly instructed the jury on the correctness of the prosecutor's remarks that the State could not call the wife of the defendant as a witness.

Initially, it is noted that defense counsel's objection interrupted the prosecutor's sentence. While the State can call the defendant's wife to the witness stand it cannot make her testify. Alabama Code 1975, Section 12-21-227. The objected to portion of argument must be construed in its context within the prosecutor's argument.

No further or other objection was made on this matter. No clarifying instructions were submitted or requested. There was no motion for a new trial. Trial counsel, at the time of objection, made no request that the jury be instructed on what the correct law was.

The issue of the defendant's wife's testimony was presented to the trial judge before trial, during trial, and in closing argument.

Before trial, defense counsel filed a "Motio in Limine" requesting that the trial court order the prosecutor to "refrain from eliciting" testimony regarding:

"Any statement or utterance by the defendant's wife, Mildred Billingsley, because any such statement or utterance is hearsay, irrelevant, immaterial, and would be unduly prejudicial."
The record contains no ruling on this motion.

During the prosecutor's cross examination of the defendant, the following occurred';

"Q. Now, your wife is going to come in here and back you up on that testimony?
"MR. LOVE (Defense Counsel): Your Honor--
"THE COURT: Sustained.
"MR. VALESKA (Assistant Attorney General): Judge, we have a case on it.
"THE COURT: 'Give me the case, if you have one.
(Discussion held off record.)"

Following the off the record discussion, the prosecutor did not pursue the objected-to line of questioning.

From the record, it is obvious that the trial judge possessed a greater knowledge of the facts surrounding the defendant's failure to call his wife as a witness than has been presented to this Court. The wife's actual availability to either or both sides simply does not appear in the record. "In view of this state of the record we are unwilling to say that the Court's ruling prejudiced the defendant." Thompson v. State, 352 So.2d 37, 39 (Ala.Cr.App. 1977).

During the State's case it was shown that blood and tissue which could have come from the defendant or the deceased were found in the wife's hair; that the wife was present with the defendant and Abrams shortly before the killing and was present when the police arrived.

In his defense, the defendant denied seeing Abrams until he discovered him dead on his living room floor. The defendant testified that he and his wife had been drinking and had gone to bed together around 1:00 in the afternoon. When the defendant awoke, his wife was still sleeping. After the defendant discovered the body he awoke his wife who identified the corpse. Allegedly the defendant told his

wife to call the police. He testified that his wife went back to the back door and called for the neighbors. The defendant also maintained that the blood on the couch belonged to his wife.

The defendant's testimony was in seemingly unresolvable conflict with the State's evidence. The defendant denied telling Mrs. Black that he had killed someone. He denied seeing either the deceased or a Yellow Cab at his house although witnesses placed both in the defendant's presence. The defendant's trial testimony was even in conflict with a statement he had given the Sheriff after the homnicide. In conclusion, it appears that, besides the defendant himself, the defendant's wife was the only witness who could dispute the State's formidable case of circumstantial evidence against the defendant. No doubt the jury was left bewildered by Mrs. Billingsley's failure to testify and the defendant's failure to explain her absence.

Jurors are not trained in the law. In the context of the prosecutor's argument we do not think that they would appreciate the distinction between "calling" a witness and being able to make her testify. This is not to underestimate their intelligence for the appellate courts of this state have fallen prey to the same lack of distinction. DeBardeleben, Thus, to an ordinary layman, to call a witness would imply that he or she could or would testify--or could be made to testify. To some extent this same idea is recognized in the rule that a "witness may be hailed into court by compulsory process at the instance of either party, but this does not make the witness equally accessible or available to each." Brown v. State, 50 Ala.App. 471, 475, 280 So2d 177, 180, cert. denied, 291 Ala.774, 280 So2d 182 (1973). So, while the prosecutor's argument that the State could not call the defendant's wife was technically incorrect, as the State had the power to subpoena her although she could not be made to testify, we do not think that its effect upon the jury was such as to require a reversal of this particular case.

Substantial error is not presumed on appeal. The burden is on the defendant to show error and the judgment appealed from will not be reversed unless it appears to the appellate court that the error complained of probably

affected injuriously the defendant's substantial rights. Bryson v. State, 264 Ala.111, 84 So2d 785 (1956).

IV

(7) The defendant's argument that the State failed to establish the necessary predicate for the admission of a "transfusion record" showing the defendant's blood type is not supported by the record. This document was admitted under the business records exception to the hearsay rule. Specifically, the defendant contends that the State failed to show that it was the regular practice of the Sylacauga Hospital to make records at the time of the event recorded or within a reasonable time thereafter. This is the last of the four elements necessary for a proper predicate for the introduction of a business record. McElroy, S 254.01(3)

This argument ignores the custodian's testimony at trial. The blood transfusion record from the hospital bears the date "7-25-72."

> "Q. Now, these records are ordinarily, normally, always made by the hospital when a person receives a blood transfusion at the hospital?
> "A. Yes, sir".

The blood transfusion record was properly admitted into evidence after the State presented a proper predicate.

V

(8) The seizure of the blood and tissue from Mrs. Billingsley's hair was proper. The material observed was in plain view. Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). The officers were justified in seizing the potential evidence before it could fall or be washed out. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Moreover, the defendant has no standing to challenge the alleged search of his wife's person. Fourth Amendment rights are "personal rights" which "may not be asserted vicariously." Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

(9, 10) Relying on Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), the defendant contends

that a shotgun found in his bedroom closet was illegally seized. Mincey held that there was no "murder scene exception" to the warrant requirement of the Fourth Amendment. "The warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there.". However, the Supreme Court did not condemn all investigating and warrantless searches at the scene of a crime

> "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises....And the police may seize any evidence that is in plain view during the course of their legitimate activities." Mincey, 98 SCt. at 2413-14.

Prior to trial, the defendant filed a motion to suppress illegally seized evidence. The record contains no ruling on this motion. At trial, no reference was made by the State to any search or to the shotgun until after the issue was raised by the defense in its cross examination of Officer Robert Hay. Defense counsel asked the officer if he "began to look for a gun there on that occasion." The defense introduced into evidence a photograph of the shotgun sitting in the closet. At this point in the progress of the trial, there was no evidence that a shotgun was the murder weapon. The defendant is not permitted to present evidence to the jury on a specific issue and then object when the State attempts to present similar evidence on this same point. Additionally, the record shows that, when the shotgun was offered into evidence by the State, there was

no objection. After the State rested its case, defense counsel moved to exclude, one of the grounds for which was, "There was illegal, irrelevant, and incompetent evidence allowed to go to the jury in the case-in-chief." Under these circumstances, we do not think that the error, if any, was preserved for review.

Two other issues raised on appeal we consider to be without merit.

We have searched the record for error prejudicial to the defendant and have found none. The defendant received a fair trial. Therefore, the judgment of the Circuit Court is affirmed.

AFFIRMED.

HARRIS, P.J., and TYSON and BOOKOUT, JJ., concur

DeCARLO, J., not sitting.

Ex Parte Douglas M. BILLINGSLEY.
(Re: Douglas Billingsley
v.
State of Alabama).
79-691.
Supreme Court of Alabama.
May 8, 1981
Rehearing Denied July 10, 1981.

Defendant was conviced of second-degree murder, and the Court of Criminal Appeals, 402 So.2d 1052, affirmed. On certiorari to the Court of Criminal Appeals, the Supreme Court, Torbert, C. J., held that defendant's wife, not having elected to testify, was an incompetent witness, and it was error to allow the prosecutor to draw an adverse inference from defendant's failure to call her.

Reversed and remanded.

Almon, J., concurred specially.

On remand, Ala.Cr.App., 402 So.2d 1062.

Charles A. Graddick, Atty, Gen., and Joseph G. L. Marston, III, Asst. Atty. Gen., for respondent.

TORBERT, Chief Justice.

At issue is whether a prosecutor may comment on a defendant's failure to call his spouse to testify where it appears the spouse's testimony would be probative on the question of defendant's guilt or innocence. We hold that such comment is improper.

Defendant/petitioner was convicted of second degree murder and sentenced to twenty years' imprisonment. The Court of Criminal Appeals affirmed. As one basis for its decision, the Court of Criminal Appeals held that a spouse is a competent witness until he or she elects not to testify. The court reasoned that, since the spouse is competent and is presumably biased in favor of his or her defendant spouse, the prosecutor may comment on defendant's failure to call the spouse. Billingsley v. State, (MS. April 22, 1980) 402 So.2d 1052 (Ala.Crim.App.1980). We granted certiorari to resolve the apparent conflict between the opinion of the Court of Criminal Appeals and cases such as Arnold v. State, 353 So.2d 524 (Ala. 1977); Holyfield v. State, 365 So.2d 108 (Ala.Cr.App.), cert. denied, 365 So.2d 112 (Ala.1978); and DeBardeleben v. State, 16 Ala.App. 367, 77 So. 979 (1918).

Detailed recitation of the facts is unnecessary. However, it appears that defendant's wife was with him (or close by) when the alleged murder occurred. At trial, neither the prosecution nor the defense called defendant's wife to testify. Over defendant's objection, the trial court allowed the prosecutor in his closing argument to comment at length about defendant's failure to call defendant's wife as a witness. On appeal, the Court of Criminal Appeals held that the trial judge's ruling was proper.

(1, 2) At common law a spouse was incompetent to testify either for or against a mate. Holyfield v. State, 365 So.2d 108 (Ala.Crim.App.), cert. denied, 365 So.2d 112 (Ala.1978). The Alabama legislature enacted a statute, however, which modified the common law by providing that a spouse may elect to so testify. See, Code 1975, S 12-21-227. The election

is made by the witness-spouse and the defendant-spouse can in no way compel or prevent the testimony. Holyfield v. State, 365 So.2d 108 (Ala.Crim.App.), cert. denied, 365 So.2d 112(Ala.1978). Alabama appellate courts have construed the statue as abrogating the common law to the extent that a spouse becomes a competent witness only after electing to testify. See, Arnold v. State, 353 So.2d 524 (Ala. 1977); Holyfield v. State, 365 So.2d 108 (Ala.Crim.App.), cert. denied, 365 So.2d 112 (Ala.1978); Debardeleben v. State, 16 Ala.App. 367, 77 So. 979 (1918). Defendant's wife, not having elected to testify, was an incompetent witness. Thus, it was error to allow the prosecutor to draw an adverse inference from defendant's failure to call her. See, 88 C.J.S. Trial S 184 p. 364 (1955).

REVERSED AND REMANDED.

MADDOX, FAULKNER, JONES, SHORES, EMBRY, BEATTY and ADAMS J.J., concur.

ALMON, J., concurs specially.

ALMON, Justice, concurring specially.

I concur with the majority opinion, and only mildly quibble with the use of the word "competency" rather than the word "privilege.".

At common law, a husband and wife could not testify against each other, and were thus considered incompetent as a matter of law. The statute, Code 1975, S 12-21-227, removed this incompetency and at the same time granted either spouse the privilege of testifying or not against the other as they chose.

Douglas BILLINGSLEY

v.

STATE.

7 Div. 710.

Alabama Court of Criminal Appeals.

Aug. 4, 1981

Appeal from Talladega Circuit Court.

After Remandment

BOWEN, Judge.

This case is reversed and the cause remanded on authority of the decision of the Supreme Court of Alabama in Billingsley v. State, 402 So.2d 1060 (1981).

REVERSED AND REMANDED.

All Judges concur

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

No. _____

Douglas M. Billingsley, Petitioner

v

State of Alabama, Respondent

I hereby certify that on this 19th day of November 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Charles Graddick, Esq., Administrative Building, 64th North Union Street, Montgomery, Alabama 36130. Counsel for the Respondent. I further certify that all parties required to be served have been served.

Huel M. Love

Huel M. Love
Counselor for Petitioner
130 East Street
Talladega, Al 35160

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